(13)

Supreme Court, U.S.
FILED
FEB 18 2003
OFFICE OF THE CLERK

No. 02-215

IN THE

Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONERS' REPLY BRIEF

WILLIAM E. GRAUER*
CHRISTOPHER R. J. PACE
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6000

* *Counsel of Record for PacifiCare Health Systems, Inc., and PacifiCare Operations, Inc.*

JAMES W. QUINN
JEFFREY S. KLEIN
EDWARD SOTO
GREGORY S. COLEMAN **
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

** *Counsel of Record for UnitedHealth Group Incorporated and UnitedHealthcare, Inc.*

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE MEANING AND EFFECT OF REMEDIAL PROVISIONS IN AN ARBITRATION AGREEMENT ARE OUTSIDE THE SCOPE OF A COURT'S ARBITRABILITY DETERMINATION	2
II. RESPONDENTS SHOULD BE REQUIRED TO ARBITRATE THEIR RICO CLAIMS BECAUSE THEY HAVE FAILED TO DEMONSTRATE THAT THE DAMAGE LIMITATION PROVISIONS LIMIT THEIR RICO RIGHTS	13
A. A Limitation on Punitive Damages in an Arbitration Agreement Does Not Preclude an Award of RICO Treble Damages	13
B. Dr. Porth Can Recover RICO Treble Damages Under His Arbitration Agreement That Limits "Extracontractual Damages."	14
III. THE COURT HAS NOT BARRED PROSPECTIVE WAIVERS OF STATUTORY REMEDIES, AND CONGRESS DID NOT PROHIBIT SUCH WAIVERS IN RICO	15
IV. ALTERNATIVELY, THE DAMAGE LIMITATION PROVISIONS SHOULD BE SEVERED TO PRESERVE ARBITRATION OF THE RICO CLAIMS	19
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	17
Buckley v. *Valeo*, 424 U.S. 1 (1976)	16
Cange v. *Stotler & Co.*, 826 F.2d 581 (CA7 1987)	18
Carneiro Da Cunha v. *Standard Fire Ins. Co./Aetna Flood Ins. Program*, 129 F.3d 581 (CA11 1997)	15
County of Middlesex v. *Gevyn Constr. Corp.*, 450 F.2d 53 (CA1 1971)	11
D.H. Overmyer Co. v. *Frick Co.*, 405 U.S. 174 (1972)	17
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002)	6, 15
Evans v. *Jeff D.*, 475 U.S. 717 (1986)	18
First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995)	10
Gannon v. *Circuit City Stores, Inc.*, 262 F.3d 677 (CA8 2001)	19
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)	*passim*
Graham Oil Co. v. *ARCO Prods. Co.*, 43 F.3d 1244 (CA9 1995)	19
Graver Tank & Mfg. Co. v. *Linde Air Prods. Co.*, 336 U.S. 271 (1949)	15
Green Tree Fin. Corp.—Ala. v. *Randolph*, 531 U.S. 79 (2000)	4, 8, 12
Halcon Int'l, Inc. v. *Monsanto Austl. Ltd.*, 446 F.2d 156 (CA7 1971)	11
Howsam v. *Dean Witter Reynolds, Inc.*, __ U.S. __, 123 S.Ct. 588 (2002)	*passim*
Jarecki v. *G.D. Searle & Co.*, 367 U.S. 303 (1961)	15

TABLE OF AUTHORITIES—Continued

	Page
John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964)	5, 7
Johnson v. *W. Suburban Bank*, 225 F.3d 366 (CA3 2000)	17
Kremer v. *Chem. Constr. Corp.*, 456 U.S. 461 (1982)	5
In re Managed Care Litig., 132 F.Supp.2d 989 (S.D. Fla. 2000)	3, 10, 12
Matsushita Elec. Indus. Co. v. *Epstein*, 516 U.S. 367 (1996)	3
Metro East Ctr. for Conditioning & Health v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924 (CA7 2002)	16-18
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)	*passim*
Molzof v. *United States*, 502 U.S. 301 (1992)	14
Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)	3, 11
Shearson/American Express, Inc. v. *McMahon*, 482 U.S. 220 (1987)	*passim*
Town of Newton v. *Rumery*, 480 U.S. 386 (1987)	18
United States Civil Serv. Comm'n v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973)	16
Venegas v. *Mitchell*, 495 U.S. 82 (1990)	18
Vimar Seguros y Reaseguros, S.A. v. *M/V Sky Reefer*, 515 U.S. 528 (1995)	6, 8
Volt Info. Scis., Inc. v. *Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)	15
Wright v. *Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998)	17

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
E. ALLAN FARNSWORTH, FARNWORTH ON CONTRACTS (2d ed. 1998)	19
RESTATEMENT (SECOND) OF CONTRACTS	19
SAMUEL WILLISTON, WILLISTON ON CONTRACTS (Richard A. Lord 4th ed. 1990)	11, 19
Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate, Not Litigate*, AMERICAN MEDICAL NEWS, February 10, 2003	1

ARGUMENT

When parties have entered into a written contractual agreement to arbitrate, a district court can refuse to order arbitration only when: (1) the dispute is not within the scope of the parties' contractual arbitration agreement; (2) the agreement to arbitrate is subject to revocation under §2; or (3) one of the parties has asserted a federal statutory claim and Congress has clearly expressed an intent that the statutory claim not be arbitrated. Respondents have not argued, and cannot argue, that any of those circumstances exist in this case.

Instead, respondents and their amici[1] argue that a damage limitation provision in the parties' agreement will independently excuse parties from arbitration if they can assert a claim under a federal statute whose remedies are (or merely may be) limited by contract. Respondents' theory prohibiting contractual remedial limitations in arbitration would dramatically reshape both the substantive law regarding the validity of agreements to arbitrate under the FAA and the process under which such determinations have traditionally been made by the arbitrator.

Parties in most circumstances may agree prospectively to limit or waive remedies in litigation or arbitration, and the Court has never suggested, much less held, that the mere existence of a contractual agreement to limit remedies will excuse a party from arbitrating federal statutory claims that the party has agreed to arbitrate. Respondents do not even argue that the damage limitation provisions are independently invalid. Even if they were, an invalid remedial limitation

---

[1] While physician groups are frequent amicus curiae advocates in this Court, none of those groups has chosen to file an amicus brief supporting respondents, presumably because many of those groups encourage arbitration themselves. *See* Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate, Not Litigate*, AMERICAN MEDICAL NEWS, February 10, 2003 (available at http://www.ama-assn.org/scipubs/amnews/pick_03/prl10210.htm).

should not void the parties' contractual agreement to arbitrate, and the Court has never held that a damage limitation provision and agreement to arbitrate mutually infect and invalidate one another when used together. Nor has the Court held that only courts—and not arbitrators—are competent to evaluate the validity or scope of a negotiated damage limitation provision.

Respondents and their amici focus on hypothetical examples in which consumers or employees with inadequate bargaining power are coerced into contracts under which they are required to arbitrate and waive many of their substantive rights. To the extent that such individuals would be entitled to relief from their arbitration agreements, that relief would be based on §2 revocation grounds, not because a remedial limitation excuses arbitration. Those kinds of §2 defenses would not, however, be applicable to the contracts negotiated by respondents, all sophisticated actors with advanced degrees.

Respondents contractually agreed to arbitrate their disputes with United and PacifiCare. Respondents' agreements to arbitrate are not revocable under §2, their RICO claims are within the scope of their agreements to arbitrate, and the Court has expressly held that RICO claims may be arbitrated. The district court should have required respondents to arbitrate all of their RICO claims.

I. THE MEANING AND EFFECT OF REMEDIAL PROVISIONS IN AN ARBITRATION AGREEMENT ARE OUTSIDE THE SCOPE OF A COURT'S ARBITRABILITY DETERMINATION.

As the Court recently reiterated in *Howsam* v. *Dean Witter Reynolds, Inc.*, __ U.S. __, 123 S.Ct. 588, 592 (2002), a court may decide whether an arbitration agreement is enforceable under §2 and whether a dispute is within the scope of the parties' agreement to arbitrate. *See Mitsubishi Motors Corp.*

v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). When a federal statutory claim is raised, a court may decide whether Congress has expressed an intent in the federal statute creating the claim to exempt the claim from arbitration. *Mitsubishi*, 473 U.S., at 628; *cf. Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 380-86 (1996). Once those questions are answered in favor of arbitration, however, the court's inquiry is at an end and arbitration must be ordered. *See* §4; *Howsam*, 123 S.Ct., at 592; *Mitsubishi*, 473 U.S., at 627-28; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). All other issues may be raised in, and resolved by, the arbitral forum. *See Howsam*, 123 S.Ct., at 592.

In this case, the district court found, and it has not been disputed, that: (1) the arbitration agreements were enforceable under §2, s*ee In re Managed Care Litig.*, 132 F.Supp.2d 989, 1000-01, 1005, 1007 (S.D. Fla. 2000); (2) respondents' RICO claims fell within the scope of the arbitration agreements, *see id.*, at 1000 n.3, 1001 n.4, 1005 n.9; and, (3) RICO claims are subject to arbitration, *see id.*, at 993 (citing *McMahon*, 482 U.S., at 220). The district court's inquiry should have ended at that point, and the court should have ordered respondents to arbitrate their RICO claims.

Attempting to dramatically expand the district court's pre-arbitration inquiry, respondents radically misapply out-of-context phrases from a handful of the Court's decisions to erroneously suggest that the Court has authorized an intensive, searching review of remedial limitations in cases involving federal statutory claims. Respondents make the same arguments to restrict arbitration of federal statutory claims that the Court has rejected in holding that statutory

claims are arbitrable.[2] Respondents cling to a theory under which federal statutory claims are presumptively not arbitrable unless the court first makes certain findings, Resp. Br. 8-9, but the Court has consistently emphasized that statutory claims *are* arbitrable unless Congress has clearly indicated otherwise. *See Mitsubishi,* 473 U.S., at 627-28; *McMahon,* 482 U.S., at 226-27; *Gilmer,* 500 U.S., at 26; *Green Tree Fin. Corp.—Ala.* v. *Randolph*, 531 U.S. 79, 89-90 (2000). Thus, there is no "uneasy union between arbitration and statutory rights," Resp. Br. 7, and respondents' claim merely manifests their general hostility to arbitration and their specific refusal to fulfill their contractual duty to arbitrate their RICO claims.

The "legal constraints external to the parties' agreement" envisioned by the Court in *Mitsubishi*, 473 U.S., at 628, were solely those potentially imposed by congressional intent to preclude arbitration of certain statutory claims. That review was authorized by the Court to be a limited evaluation of whether Congress had foreclosed the possibility of arbitration of certain statutory claims, not an open-ended review of any asserted error relating to the arbitration. The Court in *Mitsubishi* acknowledged that Congress can make statutory claims nonarbitrable, but certainly did not intend to permit a plaintiff, simply by alleging a violation of a federal statute, to dramatically alter the prearbitration review performed by a court.

Respondents are equally misguided in assuming that they need not arbitrate federal statutory claims if they can allege procedural or remedial limitations that might restrict their

[2] *Compare* Resp. Br. 12 (complaining that "[a]rbitrators are not generally required to write or publish opinions") *with Gilmer*, 500 U.S., at 31-32 (rejecting that complaint as a rationale for not compelling arbitration of ADEA claims). The AAA rules, which govern arbitration under the contracts at issue in this case, require a written ruling and permit any party to request a written rationale for the award. *See* App., Rule R-44.

ability to "effectively vindicate" their claims in arbitration. Resp. Br. 8-9. The Court has restricted the prearbitration "effective vindication" determination to whether there is a categorical conflict between arbitration under the FAA and the statute authorizing the plaintiff's claim. In so doing, the Court has acknowledged that, while Congress expressly ordered in the FAA that arbitration agreements be enforced, Congress also has the authority through separate legislation to exempt statutory claims from the reach of the FAA (although it has rarely done so).[3] *See Mitsubishi*, 473 U.S., at 627 ("[I]t is the congressional intention *expressed in some other statute* on which the courts must rely to identify any *category of claims* as to which agreements to arbitrate will be held unenforceable.") (emphasis added). Because that determination addresses the statutory reach of the FAA, it makes sense to permit a court to determine whether Congress has exempted a statutory scheme from the reach of the FAA. But, again, permitting courts to delay or interfere with arbitration to address premature and speculative questions about remedial limitations decides nothing about arbitrability and merely denies the parties the benefit of their contractual agreement to arbitrate. *See John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 558 (1964).[4]

[3] In searching for an inherent conflict between the FAA and the statute that forms the basis for the claims, the focus is on whether there is an "irreconcilable conflict" like that required in the Court's implied repeal jurisprudence. *See, e.g., Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

[4] Respondents in effect seek a wholesale overruling of the restrictions the Court has placed on prearbitration review, advocating a system in which a party to an arbitration agreement would be able to obtain prearbitration judicial review of a wide-ranging list of complaints about arbitration, Resp. Br. 17-19, thus ensuring that the courthouse will be a substantial obstacle in enforcing any contractual agreement to arbitrate.

Consistent with that limited approach, the Court has expressly prohibited judicial consideration of contract-based arbitral procedures or remedies until the award-enforcement stage. For instance, in *Mitsubishi*, the Court rejected the type of prearbitration "effective vindication" analysis employed by the district court. *See* 473 U.S., at 637 n.19 ("We therefore have no occasion to speculate on [the law to be applied by the arbitral panel] at [the motion-to-compel arbitration] stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award."); *see also Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); Pet. Br. 19-20.[5]

Respondents have additionally misconstrued the Court's descriptive statements that a party does not forgo statutory substantive rights by agreeing to arbitrate a statutory claim as a categorical prohibition on waivers or remedial limitations in connection with the arbitration of federal statutory claims. There is no basis in the Court's precedent for this proposition. Those statements from the Court describe the result of a bare agreement to arbitrate, *i.e.*, a change in forum for the resolution of the parties' disputes. *See Mitsubishi*, 473 U.S., at 628; *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 296 n.10 (2002).[6] If the Court had intended those statements as a pro-

[5] As in *Mitsubishi* and *Vimar Seguros*, the damage limitation provisions at issue here *do not expressly prohibit* the award of treble damages and certainly make no reference whatsoever to RICO treble damages. J.A.84, 106-07, 146-147, 168, 212. Rather, as in those cases, the district court was faced with only the speculative possibility that application of the damage limitation provisions could result in a conflict with the RICO statute (if one erroneously assumes that RICO remedies are not waivable). *See* Resp. Br. 13-14.

[6] The Court's statement in *Waffle House* that an employee's agreement to arbitrate did not waive the EEOC's own prerogative to sue, 534 U.S., at 296 n.10, merely reflects that a bare agreement to arbitrate does not waive the employee's own substantive rights and neither purports to nor could waive the EEOC's own right to enforce the statutory scheme. Nothing in *Waffle House* holds or even suggests that a private party cannot agree to limit the remedies available to her.

hibition on remedial limitations, they would logically apply equally to all claims, not just federal statutory claims. Nothing in either the FAA or the Court's decisions gives any indication that the parties' agreement to arbitrate remains valid only as long as the parties retain all of their remedial rights and the opposing party does not subsequently decide to assert a federal statutory claim. There is no justification for using the *potential invalidity* of a remedial limitation to excuse a party from its separate contractual obligation to arbitrate.

Once it has been determined that the statute at issue—in this case, RICO—has not been exempted from arbitration by Congress, there is no justification for differentiating these circumstances from the general review of challenges to remedial limitations, which respondents do not and cannot dispute should be performed by the arbitrator. *See John Wiley*, 376 U.S., at 546-47. If respondents had brought only negligence claims and had alleged that the damage limitation provisions improperly limited punitive damages, for example, nothing in respondents' arguments would shift that challenge to the damage limitation provisions from the arbitrator to the court. *See* Resp. Br. 21-22 n.17 (conceding that their arguments "d[o] not mean that the arbitration agreement is unenforceable as to other claims").

At the core of that implicit concession is the acknowledgment that, in the absence of respondents' allegations of statutory RICO claims, the arbitrator would resolve a challenge to the damage limitation provisions and, consequently, that it is not the kind of "narrow circumstance" discussed in *Howsam* that the parties expect a court to resolve before arbitration. 123 S.Ct., at 592. Once it is understood that Congress intended RICO claims to be arbitrable and that arbitrators would normally resolve challenges to remedial

limitations, only unsupportable lingering distrust of the arbitral process could justify specially authorizing courts to perform a prearbitration review on remedial limitations that are potentially applicable to statutory claims.

Respondents have no basis to suggest that parties entering a contractual agreement to arbitrate would "reasonably expect" a court to determine the merits of a challenge to a remedial limitation. *See* Resp. Br. 11-12. The meaning and effect of specific arbitral procedures and remedies are issues that parties expect an arbitrator to decide in the first instance. *See Howsam*, 123 S.Ct., at 592. Indeed, in *Howsam* the Court held that whether a dispute has been brought to arbitration in a timely manner—a question that must be answered *before* reaching the merits of the dispute—is one that the parties expect arbitrators to decide. *See id.* In this case, the issue involves the remedies an arbitrator can award only *after* resolving the merits of the parties' dispute. The parties clearly intended an arbitrator to resolve that issue, in part because only the arbitrator can determine on a complete record what remedies, if any, would be appropriate.[7] Inquiring into the potential availability of a particular remedy, such as RICO treble damages, before the arbitrator has made any determination that the claimant might be entitled to that remedy is purely conjectural and requires the court to engage in what the Court has already deemed to be inappropriate "speculation" at the prearbitration stage. *See Mitsubishi*, 473 U.S., at 637 n.19; *see also Green Tree*, 531 U.S., at 91; *Vimar Seguros*, 515 U.S., at 541.

---

[7] The parties also clarified their intent that the arbitrator make these determinations by adopting, in all four arbitration agreements, the AAA rules, including Rule R-8(a), which provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *See* App., Rule R-8(a). The parties thus adopted a set of arbitral rules that expressly provide that the arbitrator will make this decision.

Ultimately, respondents are forced to rely on the unsustainable position that an arbitrator cannot determine a challenge to a remedial limitation because the arbitrator is bound to the parties' contractual agreement no matter what the applicable law holds. Resp. Br. 15. That miserly interpretation of an arbitrator's authority does not accurately reflect the arbitrator's authority and duty to resolve a dispute in accordance with controlling law. *See Mitsubishi*, 473 U.S., at 636-37 ("Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."); *see* Pet. Br. 40-41 (explaining that the arbitrator is bound to apply controlling law). Ironically, the oft-quoted sentence from *Mitsubishi* on which respondents erroneously rely to suggest that a party cannot limit remedies in arbitration, Resp. Br. 8 (asserting a "requirement that the agreement result only in a change of forum rather than a forfeiture of the 'substantive rights afforded by the statute'"), is really a reaffirmation that parties generally enjoy the same substantive rights in arbitration as in litigation and, consequently, that the arbitrator has the same duty as a court to apply the same substantive law in interpreting the relevant statutes and determining the validity of any contractual remedial limitations to which the parties may have agreed.

If a remedial limitation is invalid under the governing law, an arbitrator has both the duty and authority to enforce the law correctly, and ensuring that the arbitrator has done so is one of the protections afforded by postarbitration review under §§10 and 11 of the FAA. *See McMahon*, 482 U.S., at 232 ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."). If the arbitrator in this case concludes that respondents are entitled to RICO damages but that RICO treble damages are

not awardable under the terms of the arbitration agreements, the district court could subsequently address whether that result violates a cognizable public policy or amounts to a manifest disregard of the law, which the Court and courts of appeals have recognized as bases for vacating an arbitration award. *See First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995); *Mitsubishi*, 473 U.S., at 637 n.19; Pet. Br. 24 n.14. Contrary to respondents' assertion, therefore, the arbitrator can evaluate their claim that the damage limitation provisions are not enforceable under controlling law. There is no reason to doubt the authority or willingness of the arbitrator to follow that law, and the arbitrator's determination, when made, can be adequately scrutinized in postarbitration review.

Outside the general determination of what claims come within the scope of a particular agreement to arbitrate and the evaluation of whether Congress has exempted particular statutory claims from arbitration, a court may not perform a claim-by-claim arbitrability analysis. By definition, those claims are arbitrable claims within the scope of the parties' agreement to arbitrate, and a court can only justifiably block arbitration of those claims if the agreement to arbitrate is itself revocable under §2. *See McMahon*, 482 U.S., at 226 (stating that there would be no §2 relief without a well-founded claim of fraud or excessive economic power that would provide grounds for the revocation of any contract).

Notably, respondents do not, and cannot, contend that the district court's decision that the RICO claims are not arbitrable was the result of a §2 analysis. To the contrary, the district court expressly determined that the arbitration agreements are valid, irrevocable, and enforceable. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1007 (compelling respondents to arbitrate certain claims against petitioners, including breach of contract and *quantum meruit*).

In any event, §2 does not permit the kind of claim-by-claim review respondents seek. By its text and structure, §2 emphasizes the congressionally mandated validity of agreements to arbitrate but preserves a party's common-law ability to seek revocation of the core agreement to arbitrate. *See Prima Paint*, 388 U.S., at 403-04 & n.12. The claimed improper application of the damage limitation provisions to a federal statutory claim is not an arguable ground for revocation of the parties' core agreement to arbitrate. "[T]he only grounds for revocation that meet the requirements of the Federal Arbitration Act are mutual agreement or a condition that vitiates the agreement *ab initio*, including fraud, mistake, and duress." SAMUEL WILLISTON, WILLISTON ON CONTRACTS §57:52, at 347 (Richard A. Lord 4th ed. 1990) (citing *Halcon Int'l, Inc.* v. *Monsanto Austl. Ltd.*, 446 F.2d 156, 159 (CA7 1971) (discussing §2 and explaining that "'Revocation' and 'cancellation' are closely synonymous; to revoke means 'to annul, repeal, rescind, cancel'") (citations omitted)). A court's evaluation of whether a party's agreement to arbitrate may be revoked as a result of fraud, mistake, or duress focuses on the formation of the contractual agreement to arbitrate and whether the party should be permitted to revoke it. *See County of Middlesex* v. *Gevyn Constr. Corp.*, 450 F.2d 53, 56 (CA1 1971). The §2 analysis does not encompass the application of the parties' agreement to arbitrate specific asserted claims. The claims a party chooses to assert will ordinarily be irrelevant to the revocation analysis because a party's ability to revoke an agreement to arbitrate will not depend on the subsequent events giving rise to the need for arbitration. A court may either revoke an agreement to arbitrate under §2 or not, but a court may not rely on §2 to pick and choose between asserted claims. There is no claim-by-claim revocation under §2.

Respondents' reliance on *Green Tree* is misplaced because the Court in *Green Tree* was addressing a §2 claim attempting to completely invalidate the agreement to arbitrate. The cost

issue before the Court in *Green Tree* did not relate to the evaluation of whether Congress had precluded arbitration of TILA claims, *see* 531 U.S., at 90 ("Nor does Randolph contend that the TILA evinces an intention to preclude a waiver of judicial remedies."), but rather to whether "respondent's agreement to arbitrate [was] unenforceable" under §2. *Id.*, at 89. The fact that the respondent in *Green Tree* chose to characterize her argument as one relating to "effective vindication" of her statutory claim does not change the fact that the Court relied on §2 as the basis for its willingness and ability to examine the meaning and effect of terms in the parties' arbitration agreement at the prearbitration stage. *See id.*, at 89-90. Thus, the Court noted that "prohibitive costs" could result in revocation of an arbitration agreement since such costs would deny access to the arbitral forum, making the arbitration illusory. *See id.*, at 90-91. Likewise, the only non-categorical attack evaluated by the Court in *Gilmer* was the petitioner's §2 challenge regarding unequal bargaining power, which the Court quickly rejected. 500 U.S., at 32-33.[8]

Although §2 has no direct application in this case, it is in fact the key to the primary concerns raised by respondents and their amici. For instance, respondents' complaint about unequal bargaining power, Resp. Br. 7 & n.5, 17, is clearly an issue that can be resolved in the §2 context,[9] as are the

[8] Although *Gilmer* examined whether ADEA claims could be effectively vindicated in arbitration in light of "a host of challenges to the adequacy of arbitration procedures," such as limited discovery, *see Gilmer*, 500 U.S., at 30-32, those challenges were not derived from specific limitations set forth in the parties' arbitration agreement. Instead, they were simply "generalized attacks on arbitration" that the Court had previously rejected. *Id.*, at 30.

[9] These kinds of issues do not apply to respondents, all of whom have advanced medical degrees, and whom the district court expressly found to be sophisticated actors in the negotiation of the agreements at issue in this case. *In re Managed Care Litig.*, 132 F.Supp.2d, at 998.

concerns expressed by respondents and their amici regarding potential unfairness to consumers and employees.

The district court erred in undertaking to determine the meaning and scope of the damage limitation provisions at the prearbitration stage. Once it determined that respondents' RICO claims were within the scope of their agreement to arbitrate and that the arbitration agreement itself was enforceable under §2, the district court should have compelled arbitration of respondents' RICO claims.

II. RESPONDENTS SHOULD BE REQUIRED TO ARBITRATE THEIR RICO CLAIMS BECAUSE THEY HAVE FAILED TO DEMONSTRATE THAT THE DAMAGE LIMITATION PROVISIONS LIMIT THEIR RICO RIGHTS.

Even if a court were the appropriate tribunal to decide the validity of the damage limitation provisions, respondents should still be required to arbitrate their RICO claims because they have failed to demonstrate that the damage limitation provisions limit their RICO rights at all.[10]

A. A Limitation on Punitive Damages in an Arbitration Agreement Does Not Preclude an Award of RICO Treble Damages.

The lower courts incorrectly construed the language in the arbitration agreements limiting the arbitrator's ability to award "punitive damages" as a limitation on RICO treble

[10] Respondents argue that Dr. Porth's and Dr. Kelly's arbitration agreements may be unenforceable due to "the one-year limitation period in Dr. Porth's and Dr. Kelly's agreement with United." Resp. Br. 17. United has demonstrated that the diligent-prosecution requirement is *not* an impermissible "one-year statute of limitations." Pet. Br. 27 n.17. In any event, the Court's recent opinion in *Howsam* clarifies that such issues should be decided by the arbitrator and not the court. *See* 123 S.Ct., at 592.

damages. Respondents' argument that RICO treble damages have a punitive component does not remotely suggest that RICO treble damages are within the meaning of the term "punitive damages" as that term-of-art is generally understood. *See Molzof* v. *United States*, 502 U.S. 301, 306 (1992); Pet. Br. 29-32.

The Court has never directly characterized RICO treble damages as "punitive damages." Indeed, the Court has repeatedly emphasized the remedial purpose served by RICO treble damages, *McMahon*, 482 U.S., at 240-41, and Clayton Act treble damages on which RICO damages were modeled, *Mitsubishi*, 473 U.S., at 635-36, although it is also true that the Court has referred to antitrust treble damages as being punitive in nature. Resp. Br. 24. Even if there were some ambiguity about the nature of RICO treble damages, the district court was required to construe the arbitration agreements generously in favor of arbitration so as to preserve the parties' contractual agreement to arbitrate. Pet. Br. 32. Accordingly, unless the Court finds that the limitation on "punitive damages" unambiguously precludes RICO treble damages, the damage limitation provisions should be interpreted to permit the possibility of RICO treble damages, and respondents should be required to arbitrate their RICO claims.

B. Dr. Porth Can Recover RICO Treble Damages Under His Arbitration Agreement That Limits "Extracontractual Damages."

Dr. Porth's contract bilaterally restricts the recovery of "extracontractual damages, including punitive or exemplary damages." Pet. Br. 32. RICO treble damages are not "extracontractual damages" because that term usually refers to non-economic damages, such as punitive damages or mental anguish damages, which are sometimes sought, but typically denied in pure breach of contract cases. Pet. Br. 33. RICO treble damages, on the other hand, are a statutorily created category of damages that are never available in pure breach of contract cases.[11] Because the contract specifically lists punitive and exemplary damages as examples of extracontractual damages, the term should not be interpreted under *noscitur a sociis* to include significantly different categories of damages, like RICO treble damages. *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). At worst, the provision is ambiguous and should be interpreted in favor of arbitration. *See Waffle House*, 534 U.S., at 294 (citing *Volt Info. Scis., Inc.* v. *Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

III. THE COURT HAS NOT BARRED PROSPECTIVE WAIVERS OF STATUTORY REMEDIES, AND CONGRESS DID NOT PROHIBIT SUCH WAIVERS IN RICO.

If the Court decides that the district court rather than the arbitrator should analyze the effect of the damage limitation provisions in the parties' contracts *and* that the words of the damage limitation provisions can be construed only to preclude recovery of RICO treble damages, the Court should nevertheless compel arbitration in this case. The Court's precedents and the congressional intent underlying RICO make clear that the parties' agreement to waive a subset of their available remedies under RICO is valid and enforceable.

The lower courts did not find, and respondents have not argued, that the damage limitation provisions are invalid independent of the arbitration agreements. Nevertheless,

---

[11] "Contract interpretation is generally a question of law." *Carneiro Da Cunha* v. *Standard Fire Ins. Co./Aetna Flood Ins. Program*, 129 F.3d 581, 584 (CA11 1997). Accordingly, the "two-court" rule, *see* Pub. Cit. Br. 4 n.2, has absolutely no application here because that rule merely precludes the Court from disturbing "concurrent findings of fact"—not questions of law. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

amicus Public Citizen incorrectly suggests that private parties may *never* prospectively exempt themselves from a federal statutory scheme that provides mechanisms to enforce a standard of conduct. *See* Pub. Cit. Br. 6. The authority cited by Public Citizen deals almost exclusively with attempts by parties to completely shield themselves from the substantive protections of certain federal statutes intended to protect consumers and employees, such as Title VII, the FLSA, and the Truth in Lending Act. Pub. Cit. Br. 5-8. The damage limitation provisions in this case, however, do not attempt to exempt United or PacifiCare from the standards of conduct proscribed by Congress in the RICO statute. *See McMahon*, 482 U.S., at 228 (distinguishing waivers of "compliance" from other waivers). To the contrary, the arbitrator will be fully able to determine whether United and PacifiCare violated the standards of conduct mandated by RICO and, if respondents prevail, to award appropriate remedies for any violations found by the arbitrator.

Parties may mutually agree to partially waive remedies provided by federal statutes.[12] Pet. Br. 34. As the Seventh Circuit recently recognized, the Court "has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver." *Metro East Ctr. for Conditioning & Health* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924, 928 (CA7 2002). The Court has repeatedly upheld waivers of constitutional or statutory rights. *See* Pet. Br. 35-40; *see also Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976) (holding that political candidates may waive some speech rights in exchange for a federal subsidy); *United States Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (providing that public employees may waive their

[12] It is difficult to imagine, if petitioners were suing respondents for fraudulently submitted claims, that respondents would be decrying the unfairness of the damage limitation provisions or urging that they invalidated the parties' agreements to arbitrate. *See* note 1, *supra*.

right of political speech in exchange for employment); *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 186-88 (1972) (holding a pre-dispute waiver of the constitutional right to notice and a hearing contained in a cognovit note valid where the parties enjoyed equal bargaining positions and the contract was not one of adhesion). In addition, lower courts have upheld prospective waivers of statutory rights when Congress has not evidenced an intent to prohibit such waivers. *See* Pet. Br. 34, 38; *see also Metro East*, 294 F.3d, at 928-29 (upholding an arbitration clause providing for the allocation of attorney's fees under the American Rule, rather than the Communications Act's fee shifting provision); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 369 (CA3 2000) (validating an arbitration clause that waived the class action remedy available under the Truth In Lending Act).

The cases cited by Public Citizen do not support a broad prohibition of prospective waivers of a subset of available statutory remedies. Instead, those cases merely acknowledge that individuals cannot waive statutory rights and remedies when Congress has so mandated to protect vulnerable classes, such as employees or consumers.[13] But neither respondents nor their amici ever presented any evidence that Congress in enacting RICO intended to prohibit either prospective or

[13] Public Citizen also relies heavily on the Court's pronouncement in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), that "an employee's rights under Title VII are not susceptible of prospective waiver." *Id.*, at 51-52; *see* Pub. Cit. Br. 5-6. That statement is dictum, and the Court recognized in *Gilmer* that an employee may execute an arbitration agreement relinquishing the right to litigate employment discrimination claims. *Gilmer*, 500 U.S., at 33-35. Indeed, the Court has questioned whether the statement survived *Gilmer*. *See Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998). In any event, the private attorney general model on which *Alexander* relied, *see* 415 U.S., at 45, "is simply less plausible" for the typical RICO plaintiff than it is for the typical antitrust plaintiff. *McMahon*, 482 U.S., at 242.

retrospective waivers in order to protect a vulnerable class of citizens with unequal bargaining power. Pet. Br. 37-38.

Public Citizen also mischaracterizes the Court's holdings in *Evans* v. *Jeff D.*, 475 U.S. 717, 730-32 (1986) (providing that plaintiffs may waive attorneys' fees under 42 U.S.C. §1988), and *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987) (allowing waiver of right to file suit under 42 U.S.C. §1983), claiming they allow waivers of substantive statutory rights only if such waivers are either contained in a settlement or are the subject of an existing dispute. Pub. Cit. Br. 4-5. Neither case made any distinction based on when the waiver was effectuated.[14] On the contrary, the Court has already refuted that reading by explaining that under *Evans*, "as far as §1988 is concerned, it is the party's right to *waive, settle, or negotiate* [his or her] eligibility" for a statutory award of attorneys' fees. *Venegas* v. *Mitchell*, 495 U.S. 82, 88 (1990) (emphasis added).

Furthermore, there are no similar public policy concerns when each party is a sophisticated, commercial actor, bargaining for what he or she considers more important. Because Congress did not intend to protect respondents from their own voluntary decisions, the damage limitation provisions contained in the arbitration agreements are therefore valid and enforceable.

---

[14] *See, e.g., Metro East*, 294 F.3d, at 929 (discussing *Evans* and *Rumery*, and stating that "[a] pre- versus post-dispute line has been drawn by a few statutes, such as the Fair Labor Standards Act, but §206 of the Communications Act is not among them"). A case cited by Public Citizen, *see* Pub. Cit. Br. 7, recognized this principle. *See Cange* v. *Stotler & Co.*, 826 F.2d 581, 596 (CA7 1987) ("[Neither *Evans* nor *Rumery*] embody a distinction between anticipatory waivers and subsequent ones . . . [but] start from the premise that people may strike bargains as they please . . . . There is a difference between statutes that forbid waivers and those that do not.") (Easterbrook, J., concurring).

IV. ALTERNATIVELY, THE DAMAGE LIMITATION PROVISIONS SHOULD BE SEVERED TO PRESERVE ARBITRATION OF THE RICO CLAIMS.

Even if the Court holds that the damage limitation provisions are not valid, respondents should still be required to arbitrate their RICO claims. There is no independent basis for revoking the parties' agreement to arbitrate, and there is no reason why a court's invalidation of a damage limitation provision should additionally release a party from its contractual obligation to arbitrate. Respondents argue against severance, yet their entire theory depends on severing the damage limitation provision and the agreement to arbitrate, rather than merely the damage limitation provision.

In contrast to respondents' reliance on *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244 (CA9 1995), there has been no evidence presented or even alleged that the arbitration agreements in this case constitute an improper scheme to deprive respondents of any statutory rights. In any event, it is a well-known principle of contract law that an illegal contract provision may be severed from the remainder of the contract if it is possible to do so without rendering the remainder of the contract meaningless.[15] *See Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677, 680-81 (CA8 2001); Pet. Br. 41. "An illegal portion of an agreement that relates to the remedy is more readily separable." WILLISTON, *supra*, §19.69, at 543 (citing RESTATEMENT (SECOND) OF CONTRACTS §183 and comment a; §184) ("If less than all of an agreement is unenforceable under . . . §178, a court may nevertheless enforce the rest of the agreement . . . if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange."); *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §5.8 (2d ed. 1998).

---

[15] PacifiCare's agreements contain specific severabililty clauses.

Severance of the damage limitation provisions would not encourage parties to include illegal limitations in arbitration agreements. To the contrary, severance will greatly favor respondents, *Gannon*, 262 F.3d, at 682-83, and, as a result of the delays caused by these seemingly interminable prearbitration proceedings, the parties have now "lost many of the advantages of arbitration." *Id.*, at 682 n.7. Respondents' suggestion that severance of the damage limitation provisions would encourage drafters to include illegal limitations in arbitration agreements is undermined by the forfeiture of the very purpose for which the parties agreed to arbitrate all disputes arising out of their business relationship.

CONCLUSION

For these r[illegible]sons and those stated in petitioners' opening brief, the judgm[illegible] of the court of appeals should be reversed.

Respectfully submitted,

WILLIAM E. GRAUER*
CHRISTOPHER R. J. PACE
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6000

* *Counsel of Record for PacifiCare Health Systems, Inc., and PacifiCare Operations, Inc.*

JAMES W. QUINN
JEFFREY S. KLEIN
EDWARD SOTO
GREGORY S. COLEMAN **
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

** *Counsel of Record for UnitedHealth Group Incorporated and UnitedHealthcare, Inc.*

Counsel for Petitioners

February 12, 2003

APPENDIX

APPENDIX

Commercial Arbitration Rules of the AAA (excerpted):

R-8. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-44. Form of Award

a. Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

b. The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.